(2)
90-622
Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

SIDNEY EFRONSON
Counsel of Record
2250 S.W. 3rd Avenue, Suite 100
Miami, Florida 33129

RAMON TOURGEMAN
2250 S.W. 3rd Avenue, Suite 100
Miami, Florida 33129

Counsel for Respondents

QUESTION PRESENTED (RESTATED)

DOES THE SCOPE OF A SEARCH OF A MOTOR VEHICLE FOR NARCOTICS AUTHORIZED SOLELY BY CONSENT EXTEND TO CLOSED CONTAINERS INSIDE THE VEHICLE WHERE THE LAW ENFORCEMENT OFFICER NEVER REQUESTED OR OBTAINED PERMISSION TO SEARCH CONTAINERS INSIDE THE VEHICLE.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED (RESTATED)	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF THE CASE.....	2
REASON FOR DENYING THE WRIT	6
THE DECISION OF THE COURT BELOW THAT THE SCOPE OF A SEARCH OF A MOTOR VEHICLE FOR NARCOTICS AUTHORIZED SOLELY BY CONSENT DOES NOT EXTEND TO CLOSED CONTAINERS IS CONSISTENT WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL, AND DECISIONS OF APPELLATE COURTS OF OTHER STATES.	
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases	Page(s)
Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 25 L.Ed.2d 685 (1967)	11
Florida v. Wells, 58 U.S.L.W. 4454, 110 S.Ct. 1632, 105 L.Ed.2d 692 (1990)	7, 12
Gamble v. State, 318 Md. 120, 567 A.2d 95 (1989)	15
Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)	9
Shelton v. State, 549 S.2d 236 (Fla. 3rd DCA 1989).....	4
State v. Huether, 453 N.W.2d 778 (N.D. 1990).....	15
State v. Wells, 539 So.2d 464 (Fla. 1989), *aff'd* on other grounds, 110 S.Ct. 1632 (1990).....	5, 7, 8
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	11
United States v. Anderson, 859 F.2d 126 (7th Cir. 1988).....	14

Cases	Page(s)
United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2746, 36 L.Ed.2d 854 (1973)	9, 10
United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971)	13
United States v. Kapperman, 764 F.2d 768 (11th Cir. 1985)	14
United States v. McBean, 861 F.2d 1570 (7th Cir. 1988)	13
United States v. Ross, 456 U.S. 798, 102 S.Ct. 2151, 72 L.Ed.2d 572 (1982)	8, 9
United States v. Strickland, 902 F.2d 937 (11th Cir. 1990)	14
United States v. Ware, 890 F.2d 1008 (8th Cir. 1989)	13
United States v. White, 706 F.2d 806 (7th Cir. 1983)	15
Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980)	9, 10

No.

in the
Supreme Court
of the
United States

October Term, 1990

THE STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO
and
ENIO JIMENO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at ____ So.2d ____, 15 F.L.W. S412, No. 75,057 (Fla. July 26, 1990). (Resp. App. A–1).

The opinion of the District Court of Appeal of Florida, Third District is reported at 550 So.2d 1176 (Fla. 3rd DCA, 1989) (Resp. App. A-3).

The trial court's order granting Respondents' Motion to Suppress Evidence is not reported. (Resp. App. A-5).

STATEMENT OF THE CASE

Respondents, Luz Piedad Jimeno and Enio Jimeno, adopt the facts of the case as stated in the following trial court order granting the motion to suppress:

> On March 2, 1989, the Court heard the defendants' motion to suppress. None of the three defendants was present and counsel agreed to waive their presence.
>
> Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings:
>
> 1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.
>
> 2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.
>
> 3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.
>
> 4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.
>
> 5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.
>
> 6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, in fact, the officer never requested permission to open the bag and examine the contents.

Based on these factual findings, the Court concludes that the scope of the consent given did not extend to the search and seizure of the bag.

Since there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, *see State v. Wells*, 13 Fla.L.W. 686 (Fla. Supreme Court Dec. 1, 1988), and the motion to suppress of Enio Jimeno and Luz Jimeno must be *granted*.

However, as to defendant, Cesar Tabares, the passenger in the back seat, the motion is *denied* as he has no standing to object to the search.

Respondents in order to comply with Rule 15.1 point out that even though the Petitioner in its Brief appears to recite verbatim the trial court order, the Petitioner omitted the second and third paragraphs of section six of the order where the Court found that the search of the respondents' motor vehicle was not authorized by probable cause and was solely legally permissible based upon the consent given. (Petitioners' brief at 3-4, A-1, 2,) (Resp. App. A-5.)

The state appealed the trial court's order suppressing the evidence to the Florida Third District Court of Appeal. The court, based on its prior decision in *Shelton v. State*, 549 So.2d 236 (Fla. 3rd DCA, 1989), held that the consent to the search of the Respondents' motor vehicle for narcotics did not extend to a search of

the container where the contraband was found. (Resp. App.-3.) The court referred to its opinion in *Shelton* where it reasoned that the scope of a search authorized solely by consent is not broadened to include closed containers just because the purpose of the search was mentioned when eliciting the consent.

> . . .In contrast to the facts of the above cases, the record is devoid of any facts which would have justified the opening of the sealed container at issue. To presume that the mere identification of the purpose of a consent search in and of itself grants a police officer the right to search sealed containers within the general area agreed to by the defendant is unreasonable and impermissable under the Fourth and Fourteenth Amendments.
>
> *Shelton, supra* at 238 (Resp. App. A-7).

The Florida Third District Court of Appeal concluded its opinion in the instant case by certifying to the Florida Supreme Court the question concerning the lawfulness of searching a closed container after consent has been given to search the motor vehicle where the container is found. *State v. Jimeno*, 550 So.2d 1176, 1177 (Fla. 3d DCA 1990).

The Florida Supreme Court accepted the State's, Petitioner herein, petition for discretionary review of the certified question, and the Florida Supreme Court based on *State v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd* 110 S.Ct. 1632 (1990) approved the decision of the Third District Court of Appeal. *State v. Jimeno*, at

____, So.2d ____, 15 F.L.W.S., No. 75,057 (Fla. July 26, 1990). (Resp. App. A-1).

REASON FOR DENYING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE SCOPE OF A SEARCH OF THE MOTOR VEHICLE FOR NARCOTICS DOES NOT EXTEND TO CLOSED CONTAINERS IS CONSISTENT WITH DECISIONS OF THIS COURT, THE UNITED STATES COURTS OF APPEAL, AND THE APPELLATE COURTS OF OTHER STATES.

The Trial Court, contra to Respondents' arguments below agreed with the State that the vehicle occupied by the Respondents was lawfully stopped and that Officer Trujillo obtained valid and voluntary consent to search the vehicle. (Resp. App. A-5, A-6). However, the Trial Court in its Order stated that Trujillo did not have authority to search the contents of the bag where the drugs were found because the officer's lawful right to search the vehicle was based solely on consent which did not allow him to search the bag. The Trial Court specifically found that without the officer having any probable cause, or other circumstances existing which would justify the search beyond that defined by the terms of the consent, that then the officer exceeded the bounds of his authority when he opened and searched the contents of the bag. (Resp. App. A-5, A-6).

The Supreme Court of Florida agreed with the Trial Court's application of the former Court's decision in *State v. Wells*, 539 So.2nd 464 (Fla. 1989) as requiring suppressing the evidence in the instant case. *State v. Jimeno*, at ____ So. 2nd ____, 15 F.L.W. S 2412, No. 75, 057 (Fla. July 26, 1990). (Pet. App. A-1).

Although the Petitioner sought and obtained review by this Court of the Florida Supreme Court decision in *Wells*, the Petitioner did not seek review by this Court of that portion of the *Wells* decision addressing the scope of a search authorized by consent. Nevertheless, the Petitioner in the instant case is requesting that this Court revisit *Wells* as it applies to the scope of consensual searches. Petitioner's brief at 7-9. Therefore the Petitioner is not only seeking the granting of a writ of certiorari to review the decision in the instant case, but the force and logic of its argument is that this Court review that portion of the decision in *Wells* which the Petitioner chose not to seek review of when *Wells* was decided by this Court last term. *Florida v. Wells*, 58 U.S.L.W. 4454, 110 S.Ct. 1632, 105 L.E.D.2nd 692 (decided April 18, 1990). Respondents submit that due to the passage of time since the Florida Supreme Court decision in *Wells* and the Petitioner's not seeking review of that decision as it applies to consensual searches, that it is improper for the Petitioner to request review of the instant case by claiming that the decision in *Wells* is erroneous.

The Petitioner is clearly mistaken when it asserts that the Court below like the Court in *Wells* erroneously differentiated the scope of a consensual search from the scope of a search authorized by probable cause. According to the Petitioner the proper

scope of a consensual search is just as broad as a search authorized by a warrant or probable cause. Petitioner's brief at 7. As shown below, the Petitioner's assertions are based on its misinterpretation and misstatement of the language in the decisions of this Court, the United States Courts of Appeal, and Appellate Courts of other states.

In *State v. Wells*, 539 So.2nd 464 (Fla. 1989) The Supreme Court of Florida affirmed the supression of the evidence found in a closed container because the consent given to search the vehicle, which led to the discovery of the container, did not permit the officers to open or look inside closed containers. *Id.* at 468. The Court did not accept the State's proposition that the decision in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2151, 72 L.E.D.2nd 572 (1982) defining the scope of searches conducted based upon probable cause, be applied equally to define the scope of searches authorized by consent. *Wells*, at 466. The Court reasoned that the principles that apply to probable cause searches are totally incongrous to the freedom of choice inherent in consensual searches.

> . . . . A consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances. On the other hand, a probable cause search and its scope are compelled no matter what might be the wish of the individual. A theory based on consent and one based upon state-sponsored coercion thus are incompatible, and fusing them could lead to absurd results. Under such logic, the search of the trunk of a car would be permitted even if the Defendant had said "You can look in my car but not in my trunk". *Wells*, at 467.

The Petitioner is mistaken when it states that the Court in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2151, 72 L.E.D.2nd 572 (1982) intended to apply its decision there to define the scope of searches made without probable cause. Petitioner's brief at 9. The Court in *Ross* expressly limited itself to cases where there was probable cause to justify the search. *Id.* at 456 U.S. 800, 809, 825. In fact, the Court in *Ross* expressly distinguished the facts in *Ross* when it approved its earlier decision in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2746, 53 L.E.D.2nd 538 (1977) because in *Chadwick* there was no probable cause to justify the search. *Ross* at 456 U.S. 817.

The Petitioner incorrectly argues that the decision in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.E.D.2nd 854 (1973) recognized that the scope of a consent search is the same as in a probable cause setting. Petitioner's brief at 7. In *Schneckloth* the Court did not address the scope of a consensual search because the only issue before it was whether the consent to search was voluntarily given. *Id.* at 412 U.S. 222, 223. Therefore, the decision in *Schneckloth* does not present any conflict with the decision of the Court below in the instant case.

Contrary to the Petitioner's assertion the decision in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.E.D.2nd 410 (1980) does not hold that the scope of a consensual search is equal to the scope of a probable cause search. In fact, the decision in *Walter*

supports the decision below in the instant case because the Court in *Walter* expressly differentiated the scope of a search authorized by probable cause from the scope of a search authorized by consent.

> . . . .When an official search is properly authorized whether by consent or by the issuance of a valid warrant the scope of a search is limited by the terms of its authorization. *Walter* at 447 U.S. 657.

The Court in *Walter* explained that since the practice of general exploratory searches conducted pursuant to open-ended warrants were the immediate evils sought to be abolished by the framers of the fourth amendment, that then the scope of every search must be limited by the terms of its particular authorization, whether that be the issuance of a search warrant or any of the five exceptions to the warrant requirement. *Walter* at 447 U.S. 657.

The Petitioner's blanket assertion that decisions of this Court conflict with the decision of the Court below is not only not supported by the cases it cites in its brief, but also other decisions of this Court clearly support the decision in the Court below. In *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.E.D.2nd 538 (1977) the Court decided that due to the significant differences existing between searches conducted upon probable cause from those conducted without probable cause that allowing the scope of searches to be the same in both instances would invite violations of the Fourth Amendment.

> . . . . In warrantless searches the salutary limits of limits of the warrant do not exist, and therefore the scope of a warrantless search must be determined on other basis. *Chadwick* at 433 U.S. 10.

In *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.E.D.2nd 889 (1968) the Court addressed the scope of a search made without probable cause, and based upon the officers suspicion of the Defendant being involved in criminal activity. The Court held that when an officer suspects an individual of being involved in criminal activity, but has no probable cause supporting his suspicions, then the officer's search of the individual must be limited to the purpose behind the search which is to assure the officer's safety. The Court reasoned that the scope of the search in this situation must be defined and tied to the circumstances which rendered its initiation permissable. Otherwise, the officer would have free rein to conduct a search not justified by the circumstances, and this would be in violation of the Fourth Amendment. *Id.* at 19, 26.

Likewise, in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 25 L.E.D.2nd 685 (1967) the Court limited the scope of a search incident to an arrest to that area where weapons could be obtained by the Defendants or evidence could be destroyed by the Defendants. *Id.* at 764. The Court repeated that the scope of a search must be in any case defined by the circumstances justifying it. *Id.* at 768.

Although the Court was not given the opportunity to address the scope of the consensual search when it granted the Petitioner's request for a writ of certiorari

in *Florida v. Wells*, 58 U.S.L.W. 4454, 110 S.Ct. 1632, 105 L.E.D.2nd 692 (decided April 18, 1990), the Court's holding is consistent with the decisions discussed here, and with the decision in the Court below. In *Wells*, this Court held that the scope of a motor vehicle inventory search was exceeded when the search extended to a closed container because the agency conducting that search did not have any policy providing for the opening and searching of closed containers in inventory situations. The Court reasoned that there must be standardized criteria to regulate the opening of containers found during inventory searches in order to prevent the transformation of an inventory search into a ruse for general exploratory searches conducted to discover incriminating evidence. *Wells*, at 110 S.Ct. 1635. Again, this Court held that the scope of any search must be defined by the terms of its authorization when it stated in *Wells*.

> . . . ."Inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of loss, stolen, or vandalized property, and to guard the police from danger . . . The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment. *Wells* at 110 S.Ct. 1635".

Thus, the Petitioner is wholly mistaken in its assertion that decisions of this Court conflict with the decision of the Court below in the instant case.

The Petitioner states that decisions of the United States Court of Appeal conflict with the decision below.

In support of this proposition the Petitioner cites six Federal Circuit Court of Appeals opinions which in fact do not conflict with the decision below.

First, the Petitioner claims that *United States v. Dichiarnte*, 445 F.2d 126 (7th C.C.A. 1971) conflicts with the decision below. However, that the facts in *Dichiarnte* did not involve the search of a closed container, and the only issue there was whether the officers were authorized to seize papers in plain view. Nevertheless the Court did disapprove of officers seizing items which were not in plain view where the consent to search did not allow them to search beyond the open area. *Id.* at 130–131.

The Petitioner's use of *United States v. Ware*, 890 F.2d 1008 (8th C.C.A. 1989) in support of its petition in the instant case is equally misplaced. In *Ware* the Defendant had signed a written consent form which specifically permitted the officers to search his entire apartment. *Id.* at 1011. In the instant case the consent was oral and the Trial Court specifically found that the officer never obtained permission to search any containers. (Resp. App. A–5). Also, the Court in *Ware* upheld the search of the closed trunk found in the Defendant's apartment premises only because the Defendant had given the officers the key to open the trunk and thereby invited the officers to search the contents of the trunk. *Id.* at 1011.

The Petitioner then cites *United States v. McBean*, 861 F.2d 1570 (11 C.C.A. 1988). This case again does not support the Petitioner's argument. In *McBean* the Court did not address the scope of the search because it was not required to do so after having

determined that the Defendant lacked standing to contest the search. *Id.* at 1573. Nevertheless, the Court did take the opportunity to state in its opinion that the scope of a consent search is limited by the scope of the consent given in each case, in the same way that the scope of a search based upon a warrant is limited by the terms of the warrant. *Id.* at 1573.

The fourth United States Court of Appeal decision cited by the Petitioner is *United States v. Strickland,* 902 F.2d 937 (11 C.C.A. 1990). In *Strickland* the Court did not approve the search of the inside of the tire based on the consent given to search the automobile where the tire was found, but the basis of the Court's decision was that the officers having obtained probable cause to search the inside of the tire during their search of the automobile was the only lawful basis to search the inside of the tire. Without that probable cause then the search would have exceeded the bounds of the consent and the Trial Court's Order suppressing the evidence would have been upheld. *Id.* at 941.

In the instant case the officers never had probable cause to search the Respondent's automobile or any contents therein. (Res. App. A-5).

The Petitioner's use of *United States v. Anderson,* 859 F.2d 1171 (3rd C.C.A. 1983) and *United States v. Kapperman,* 764 F.2d 786 (11 C.C.A. 1985) does not support the Petitioner's proposition that there exists a conflict with the decision below. In both of these cases the officers obtained written consent which clearly gave them authority to conduct a complete search including searching containers.

Finally, the decision in *United States v. White,* 706 F.2d 806 (7 C.C.A. 1983), discussed by Petitioner in its brief at 13, is an abberation which is not supported by the decisions of this Court, and therefore does not warrant the granting of the petition here.

The Petitioner discusses *Gamble v. State,* 318 Md. 120, 567 A.2d 95 (1989), and *State v. Huether,* 453 N.W.2d 778 (N.D. 1990) to support its proposition that there is a conflict among the Appellate Courts of other states and the decision below. However, in *Gamble* the Court upheld the search of a gym bag because of the Trial Court's findings that under the circumstances the scope of the consent to search extended to the contents of the gym bag. *Gamble* at 567 A.2d 100. In the instant case the Trial Judge expressly found that the consent to search the automobile did not extend to a search of the contents of the bag. (Resp. App. A-5). Therefore, the decision in *Gamble* is totally distinguishable from the decision in the instant case.

The decision in *State v. Huether,* 453 N.W.2d 778 (N.D. 1990) supports the decision in the instant case, and does not provide any support to the petition here. In *Huether* the Supreme Court of North Dakota affirmed the lower Court's Order suppressing the evidence because the officers exceeded the scope of the Defendant's consent to search the Defendants automobile for open containers when they looked inside a paper bag which was partially pushed under the front passenger seat. Again, the Court repeated the language discussed in the above cited opinions when it said that officers conducting a search pursuant to consent must limit the scope of their search to that which the consent provides. *Huether* at 783.

Based on the opinions discussed by the Petitioner in its petition and other opinions of this Court discussed in this brief the decision below does not conflict with decisions of this Court, the United States Courts of Appeal, or Appellate Courts of other states. In fact, the decision of the Court below is wholly supported by the decisions of this Court, the United States Courts of Appeal and Appellate Courts of other states.

CONCLUSION

Based on the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to review the decision below.

Respectfully Submitted,

Sidney Efronson
Counsel of Record
2250 S.W. 3rd Avenue, Suite 100
Miami, Florida 33129

Ramon Tourgeman
2250 S.W. 3rd Avenue, Suite 100
Miami, Florida 33129
Counsel for Respondents

Appendix

TABLE OF CONTENTS

Page(s)

Florida Supreme Court Opinion filed on July 26, 1990 ..... App. A-1

In the District Court of Appeal of Florida Third District Opinion filed on October 24, 1989 ..... App. A-3

In the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida Order Granting Motion to Suppress as to Defendant Enio Jimeno, and Defendant, Luz Jimeno ..... App. A-6

Order Denying Motion to Suppress as to Defendart, Cesar Tabares ..... App. A-8

Shelton v. State, 549 So.2d, 236 (Fla. 3rd DCA, 1989) ..... App. A-9

[FILED JULY 26, 1990]

SUPREME COURT OF FLORIDA

No. 75,057

STATE OF FLORIDA,

Petitioner,

vs.

LUZ PIEDAD JIMENO, et al.,

Respondents.

GRIMES, J.

We accepted jurisdiction[1] to review *State v. Jimeno*, 550 So.2d 1176 (Fla. 3d DCA 1989), wherein the district court of appeal certified as being of great public importance a question concerning the lawfulness of searching a closed container after consent has been given to search a motor vehicle for narcotics.

We agree with respondents that under *State v. Wells*, 539 So.2d 464 (Fla. 1989), *aff'd*, 110 S.Ct. 1632 (1990), the consent to search a vehicle does not extend to a closed container found inside the vehicle.

Therefore, we approve the decision of the district court of appeal.

It is so ordered.

---

[1]Art. V, § 3(b)(4), Fla. Const.

SHAW, C.J., and OVERTON, EHRLICH, BARKETT and KOGAN, JJ., Concur

McDONALD, J., Diseents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

[NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1989

CASE NO. 89-888

THE STATE OF FLORIDA,

Appellant,

vs.

LUZ PIEDAD JIMENO and ENIO JIMENO,

Appellees.

Opinion filed October 24, 1989.

An Appeal from the Circuit Court for Dade County, Fredricka G. Smith, Judge.

Robert A. Butterworth, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellant.

Sidney Efronson and Ramon Tourgeman and Calianne P. Lantz, for appellees.

Before BARKDULL, NESBITT, and JORGENSON, JJ.

PER CURIAM.

The state appeals from an order granting defendants' motion to suppress physical evidence. We affirm.

The question presented in this appeal is whether a concededly valid consent to search a motor vehicle for narcotics permits a search of a closed paper bag found on the front floor of the passenger side of that car. The trial court found that even though the officer advised defendants that he wanted to search the vehicle for illegal drugs, defendants never specifically consented to a search of the rolled-up bag. Based on that finding, the trial court concluded that the scope of the consent given did not extend to the search and seizure of the bag.

This court has held that consent to a general search for narcotics does not extend to "sealed containers within the general area agreed to by the defendant." *Shelton v. State*, No. 87-1883 (Fla. 3d DCA Sept. 26, 1989). We decline to depart from the holding and rationale of *Shelton*;[1] we certify to the Florida supreme court the same question certified in *Shelton*.

Affirmed.

[1]As in *Shelton*, here, viewing the totality of the circumstances, "the record is devoid of any facts which would have justified the opening of the sealed container at issue." *Id.*

Application for Review of the Decision of the District Court of Appeal—Certified Great Public Importance

Third District—Case No. 89-888

(Dade County)

Robert A. Butterworth, Attorney General and Michael J. Neimand, Assistant Attorney General, Miami, Florida,

for Petitioner

Sidney Efronson and Ramon Tourgeman of the Law Offices of Sidney Efronson, Miami, Florida,

for Respondents

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 88-23967

THE STATE OF FLORIDA,

Plaintiff,

vs.

ENIO JIMENO, CESAR TABARES, LUZ JIMENO,
Defendants.

ORDER GRANTING MOTION TO SUPPRESS AS TO DEFENDANT, ENIO JIMENO, and DEFENDANT, LUZ JIMENO

ORDER DENYING MOTION TO SUPPRESS AS TO DEFENDANT, CESAR TABARES

On March 2, 1989, the Court heard the defendants' motions to suppress. None of the three defendants was present and counsel agreed to waive their presence.

Based on the testimony of police officer, Frank Trujillo, the Court makes the following findings:

1. Officer Trujillo first observed the defendant, Enio Jimeno, making a telephone call at a pay phone and consulting his beeper. Because of the conversation he overheard, he became suspicious that Mr. Jimeno was involved in drug trafficking. The officer then followed defendants who went by car to an apartment

complex, waited in their car, then drove around, returned to the complex, brought a package into an apartment, took it out and continued driving.

2. The officer followed the car and stopped Enio Jimeno for making a right turn at a red light without stopping. Luz Jimeno, Enio's wife, was seated in the right front passenger seat and Cesar Tabares was in the back seat.

3. The traffic stop was valid and could have been made even if the officer had no suspicion of illegal drug trafficking.

4. After the stop, Enio Jimeno freely consented to the search of the vehicle he was driving, and advised the officer the car was jointly owned by himself and his wife, Luz. Luz, who was present when the search was conducted, did not object to the search.

5. Officer Trujillo found a closed brown paper bag on the floor of the car on the front passenger side. The bag was rolled up and it was not possible to see the contents without unfolding the bag.

6. Even though Officer Trujillo advised Enio Jimeno that the reason he wanted to search the vehicle was that he was looking for illegal drugs, and the defendant could have assumed that the officer would have searched the bag, the defendant did not specifically consent to the search of the bag and, if fact, the officer never requested permission to open the bag and examine the contents.

Based on these factual findings, the Court concludes that the scope of the consent given did not extend to the search and seizure of the bag.

Since there was no probable cause for the search, no exigent circumstances existed, and the contraband was not in plain view, the search was not legally permissible, see *State v. Wells*, 13 Fla.L.W. 686 (Fla. Supreme Court Dec. 1, 1988), and the motion to suppress of Enio Jimeno and Luz Jimeno must be *granted.*

However, as to defendant, Cesar Tabares, the passenger in the back seat, the motion is *denied* as he has no standing to object to the search.

DONE AND ORDERED in chambers at Miami, Dade County, Florida this 21 day of March, 1989.

/s/ FREDRICKA G. SMITH
FREDRICKA G. SMITH
CIRCUIT COURT JUDGE

Copies furnished to:
Sidney Efronson, Esq.
Juan Vargas, Esq.

Cervantiz A. SHELTON, Appellant,
v.
The STATE of Florida, Appellee.
No. 87-1883.
District Court of Appeal of Florida,
Third District.

Sept. 26, 1989.

Defendant was convicted of trafficking in cocaine before the Circuit Court, Dade County, Mario P. Goderich, J. She appealed. The District Court of Appeal, Nesbitt, J., held that scope of defendant's consent to search her tote bag did not extend to consent to search contents of gift-wrapped package found inside bag.

Reversed and remanded.

1. Searches and Seizures —186

Scope of consent search is limited to extent of permission given, as determined by totality of circumstances. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures —172

Acquiescence in apparent authority of police to perform search is not sufficient to establish valid con [ILLEGIBLE] C.A. Const. Amend. 4.

3. Searches and Seizures —186

Train passenger's consent to search her tote bag did not extend to consent to search contents of gift-wrapped package inside bag; officers did not request permission to unwrap package. U.S.C.A. Const. Amend. 4.

Bennett H. Brummer, Public Defender, and N. Joseph Durant, Jr., Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen., and Julie S. Thornton, Asst. Atty. Gen., for appellee.

Before NESBITT, JORGENSON, and COPE,* JJ.

On Motion for Rehearing

NESBITT, Judge.

We deny appellee's motion for rehearing and substitute the following for the opinion released July 11, 1989 in order to clarify a point of law.

The defendant appeals the denial of her motion to suppress evidence obtained pursuant to a consent search and her subsequent conviction for trafficking in cocaine. We reverse.

---

*Judge Cope did not participate in oral argument.

At a Miami Amtrak station, narcotics officers approached Cervantiz Shelton after they observed her boarding a sleeping car of a train bound for Washington, D.C. with only a small tote bag and a purse. The officers identified themselves and explained that they were investigating the movement of narcotics out of Florida. Shelton was asked for identification. She produced a driver's license and a train ticket which were returned to her. She then consented to a search of her bags after being advised of her right to refuse the search request. Upon finding a very heavy, small, gift-wrapped box under some clothing in the tote bag, one officer picked up the box and began to carefully remove the wrapping. Shelton remained silent during this procedure. In the box, a kilo of cocaine was found. Shelton was charged with trafficking in the contraband. The defendant's motion to suppress the cocaine was denied, and she was subsequently found guilty of the charge. She now appeals claiming her consent to search the tote bag did not extend to consent to search the contents of the gift-wrapped package within that bag. We agree.

[1, 2] A property search conducted without a warrant and without probable cause is constitutionally invalid. However, an otherwise unreasonable search becomes reasonable upon consent to search being granted subject to a few specifically established and well delineated exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The scope of a consent search is limited to the extent of the permission given, as determined by the totality of the circumstances. *State v. Wells*, 539 So.2d 464 (Fla. 1989); *Martin v. State*, 411 So.2d 169 (Fla. 1982); *State v. Fuksman*, 468 So.2d 1067 (Fla. 3d

DCA 1985). Acquiescence in the apparent authority of the police to perform a search is not sufficient to establish valid consent. *Correa v. State*, 389 So.2d 1204 (Fla. 3d DCA 1980), *review denied*, 399 So.2d 1146 (Fla. 1981); *Major v. State*, 389 So.2d 1203 (Fla. 3d DCA 1980), *review denied*, 408 So.2d 1095 (Fla. 1981).

[3] The evidence here establishes that the defendant consented to a general search of her tote bag for narcotics. However, the scope of the consent did not extend to the unwrapping of the sealed box. There is no evidence to suggest either that the officers requested permission to unwrap the package or that Shelton consented to their search of the gift-wrapped box. As stated in *Wells*:

> When the police are relying upon consent to conduct a warrantless search, they have no more authority than that reasonably conferred by the terms of the consent. If that consent does not convey permission to break open a locked or sealed container, it is unreasonable for the police to do so unless the search can be justified on some other basis.

539 So.2d at 467.

There are cases where courts have found sufficient facts to constitute a basis for opening sealed containers pursuant to a search undertaken with the consent of the defendant. Some deal with the presence of probable cause. For example, in *State v. Cross*, 535 So.2d 282 (Fla. 3d DCA 1988), during a consensual search of luggage for narcotics, the presence of a taped, baseball-shaped object, which in the detectives' experience was a

common way to package cocaine, provided the probable cause necessary to seize the object which was found to contain cocaine. *See Palmer v. State*, 467 So.2d 1063 (Fla. 3d DCA 1985) (police discovery of "distinctively wrapped, shaped, and sized packages" constituted probable cause to believe narcotics were present and thus to authorize search of defendant's package incident to arrest). Other cases upholding seizures pursuant to consent searches are based on a finding that, when viewed in the totality of the circumstances, the scope of consent extended to the object where contraband was found. *See Rosa v. State*, 508 So.2d 546 (Fla. 3d DCA), *review denied*, 515 So.2d 230 (Fla. 1987).

In contrast to the facts of the above cases, the record in this case is devoid of any facts which would have justified the opening of the sealed container at issue. To presume that the mere identification of the purpose of a consent search in and of itself grants a police officer the right to search sealed containers within the general area agreed to by the defendant is unreasonable and impermissible under the Fourth and Fourteenth Amendments. *See Wells*, 539 So.2d at 468, *Hutchinson v. State*, 505 So.2d 579 (Fla. 2d DCA 1987), *review dismissed*, 519 So.2d 603 (Fla. 1988); *Fuksman*, 468 So.2d at 1070.[1]

Accordingly, the trial court erred in denying the motion to suppress.

However, in view of the fact that the United States Supreme Court has granted a petition for certiorari

---

[1]Preliminary to issuing this opinion, this court held an en banc hearing to determine whether [COPY MISSING]

review of *State v. Wells*, [*Florida v. Wells*, ____ U.S. ____, 109 S.Ct. 3183, 105 L.Ed.2d 692 (1989)], we certify the question discussed herein to the Supreme Court of Florida because of our lingering doubts as to the state of the law on this issue.

Reversed and remanded.